



Senate

General Assembly

File No. 622

January Session, 2001

Substitute Senate Bill No. 1036

Senate, May 7, 2001

The Committee on Appropriations reported through SEN. CRISCO of the 17th Dist., Chairperson of the Committee on the part of the Senate, that the substitute bill ought to pass.

**AN ACT SETTING PROCEDURES, PERFORMANCE STANDARDS
AND WORKPLACE QUALITY STANDARDS FOR ANY CONTRACTING
OUT-OF-STATE PROGRAMS AND SERVICES.**

Be it enacted by the Senate and House of Representatives in General Assembly convened:

- 1 Section 1. (NEW) As used in sections 1 to 13, inclusive, of this act:
- 2 (1) "Agency" means an executive office, department, division, board,
3 commission or other office or officer in the executive branch of the
4 state government.
- 5 (2) "Privatization contract" means an agreement or combination or
6 series of agreements between an agency and a nongovernmental
7 person or entity, in which such person or entity agrees to provide
8 services valued at seven hundred fifty thousand dollars or more that
9 are substantially similar to and in lieu of services provided, in whole or
10 part, by regular employees of an agency. The term "privatization
11 contract" does not include an agreement to provide legal services or
12 management consulting only.

13 Sec. 2. (NEW) (a) No agency shall execute a privatization contract
14 and no such contract shall be valid unless such agency, in consultation
15 with the Department of Administrative Services, complies with the
16 provisions of subsection (b) of this section.

17 (b) The agency shall prepare an analysis of the costs and benefits to
18 the agency of (1) privatizing services, and (2) continuing to provide
19 such services through regular employees of the agency. Such analysis
20 shall include, but not be limited to, an examination of the cost and
21 quality of service under each such option. The executive head of the
22 agency shall transmit such analysis to the State Auditors.

23 (c) If the agency determines in such analysis that it is cost-effective
24 to privatize such services, the agency shall prepare a specific written
25 statement of the services, including the specific quantity and standard
26 of quality of the services. The agency shall solicit competitive sealed
27 bids for the privatization contracts based upon such statement. The
28 day designated by the agency upon which it shall accept sealed bids
29 shall be the same for all bidders. Such statement shall be a public
30 record, filed in the agency and with the Department of Administrative
31 Services and transmitted to the State Comptroller. The term of any
32 privatization contract shall not exceed five years. No amendment to a
33 privatization contract shall be valid if it has the purpose or effect of
34 avoiding any requirement of this section.

35 Sec. 3. (NEW) (a) If an agency plans to solicit bids for a privatization
36 contract, the agency shall prepare a comprehensive written estimate of
37 the costs of regular employees of the agency providing the subject
38 services in the most cost-efficient manner and the quality of such
39 services provided by such agency employees. The estimate shall
40 include all direct costs of regular agency employees providing the
41 subject services, including, but not limited to, pensions, insurance and
42 other employee benefit costs. Any costs allocable to unemployment
43 compensation and retirement benefits shall be reported separately

44 from the value of any contract costs. The value of any state-owned
45 property or assets shall be reported separately.

46 (b) At least sixty days prior to soliciting bids for a privatization
47 contract, an agency shall notify each collective bargaining organization
48 representing employees of the agency of such planned solicitation.
49 After consulting the potentially affected bargaining units, if any, the
50 agency shall provide adequate resources for the purpose of
51 encouraging and assisting present agency employees to organize and
52 submit a bid to provide the subject services. In determining what
53 resources are adequate for this purpose, the agency shall refer to an
54 existing collective bargaining agreement of a similar employee
55 organization whose members perform the subject services, if available,
56 which agreement provides similar resources in the same or other
57 agencies. If no such collective bargaining agreement exists, the agency
58 shall refer to any existing collective bargaining agreements providing
59 such resources, and shall provide such resources at the minimum level
60 of assistance provided in such agreements. The agency shall consider
61 any such employee bid on the same basis as all other bids. An
62 employee bid may be made as a joint venture with other persons.

63 Sec. 4. (NEW) (a) Each bid for a privatization contract and each
64 privatization contract shall include provisions specifically establishing
65 the wage rate for each employee covered by the contract. Each
66 contractor shall submit quarterly payroll records to the agency, listing
67 the name, address, Social Security number, hours worked and hourly
68 wage paid for each employee in the previous quarter. The Attorney
69 General may bring a civil action for equitable relief in Superior Court
70 to enforce the provisions of this section and to prevent or remedy the
71 dismissal, demotion or other action prejudicing any employee as a
72 result of a violation of this section.

73 (b) Each bid for a privatization contract and each privatization
74 contract shall contain provisions requiring the contractor to offer

75 available employee positions pursuant to the contract to qualified
76 regular employees of the agency whose state employment is
77 terminated because of the privatization contract and who satisfy the
78 hiring criteria of the contractor. Each such contract shall also contain
79 provisions prohibiting the contractor from engaging in discriminatory
80 employment practices, as defined in section 46a-51 of the general
81 statutes, and requiring the contractor to take affirmative steps to
82 provide such equal opportunity for all such persons.

83 Sec. 5. (NEW) (a) No contractor, subcontractor, or employee or
84 agent of a contractor or subcontractor, shall have any ownership rights
85 or interest in any public record that the contractor, subcontractor,
86 employee or agent possesses, modifies or creates pursuant to a
87 privatization contract, subcontract, or amendment to a privatization
88 contract or subcontract.

89 (b) No contractor, subcontractor, or employee or agent of a
90 contractor or subcontractor, shall impair the integrity of any public
91 record that the contractor, subcontractor, employee or agent possesses,
92 modifies or creates.

93 (c) Any public record that a contractor, subcontractor, or employee
94 or agent of a contractor or subcontractor, possesses, modifies or creates
95 pursuant to a privatization contract or subcontract shall, at all times
96 and for all purposes, remain the property of the state.

97 Sec. 6. (NEW) (a) Any public record (1) provided to a contractor or
98 subcontractor by an agency, or (2) created by a contractor or
99 subcontractor pursuant to a privatization contract shall be and remain
100 a public record for purposes of the Freedom of Information Act and
101 the enforcement provisions of said act apply to any improper failure to
102 disclose such records.

103 (b) Both the agency and the contractor or subcontractor that execute
104 a privatization contract shall have a joint and several liability with

105 respect to any obligations imposed on the agency by the Freedom of
106 Information Act with respect to any public record related to the
107 privatization contract, provided the final determination as to whether
108 or not to disclose a particular record or type of record shall be made
109 solely by the agency.

110 (c) No contractor, subcontractor, or employee or agent of a
111 contractor or subcontractor, shall disclose to the public any public
112 record that (1) the contractor, subcontractor, or employee or agent
113 possesses, modifies or creates pursuant to a privatization contract,
114 subcontract, or amendment to a privatization contract or subcontract,
115 and (2) the state agency (A) is prohibited from disclosing pursuant to
116 state or federal law, (B) may only disclose to certain entities or
117 individuals or under certain conditions pursuant to state or federal
118 law, or (C) may withhold from disclosure pursuant to state or federal
119 law. No provision of this subsection shall be construed to prohibit any
120 such contractor from disclosing such public record to any of its
121 subcontractors to carry out the purposes of the privatization contract.

122 (d) No contractor, subcontractor, or employee or agent of a
123 contractor or subcontractor, shall sell, market or otherwise profit from
124 the disclosure or use of any public record in its possession pursuant to
125 a privatization contract, subcontract, or amendment to a privatization
126 contract or subcontract, except as authorized in the privatization
127 contract, subcontract or amendment.

128 (e) Any contractor, subcontractor, or employee or agent of a
129 contractor or subcontractor, that learns of any violation of the
130 provisions of section 5 of this act or this section shall, not later than
131 seven calendar days after learning of such violation, notify the agency
132 head and the Attorney General of such violation.

133 Sec. 7. (NEW) (a) In addition to any of the remedies provided under
134 the Freedom of Information Act, if any person violates any provision
135 of section 5 or 6 of this act, the Attorney General may bring an action

136 against such person in Superior Court seeking (1) damages on behalf
137 of the state for such violation, (2) restitution for damages suffered by
138 any person as a result of the violation, or (3) imposition and recovery
139 of a civil penalty of not more than fifty thousand dollars for the
140 violation.

141 (b) In addition to any of the remedies provided under the Freedom
142 of Information Act, any person aggrieved by a violation of any
143 provision of section 5 or 6 of this act may bring an action in Superior
144 Court to recover any damages suffered as a result of such violation.

145 (c) In any action brought under subsection (a) or (b) of this section,
146 the court may (1) order disgorgement of any profits or other benefits
147 derived as a result of a violation of any provision of section 5 or 6 of
148 this act, (2) award punitive damages, costs or reasonable attorney's
149 fees, or (3) order injunctive or other equitable relief. Proof of public
150 interest or public injury shall not be required in any action brought
151 under subsection (a) or (b) of this section. No action may be brought
152 under subsection (a) or (b) of this section more than three years after
153 the occurrence of such violation.

154 (d) Any person who knowingly and wilfully violates any provision
155 of section 5 or 6 of this act shall, for each such violation, be fined not
156 more than five thousand dollars or imprisoned not less than one year
157 nor more than five years, or be both fined and imprisoned.

158 Sec. 8. (NEW) (a) The executive head of an agency soliciting bids for
159 a privatization contract and the Commissioner of Administrative
160 Services shall each certify, in writing, to the State Auditors that:

161 (1) They have complied with all provisions of sections 1 to 4,
162 inclusive, of this act, and all other applicable laws;

163 (2) A cost-benefit analysis of the proposed privatization has been
164 conducted pursuant to subsection (b) of section 2 of this act and the

165 agency has determined in such analysis that it is cost-effective to
166 privatize services;

167 (3) The quality of the services to be provided by the designated
168 bidder is likely to satisfy the quality requirements of the statement
169 prepared pursuant to subsection (c) of section 2 of this act and to equal
170 or exceed the quality of services that are provided by regular agency
171 employees pursuant to subsection (a) of section 4 of this act;

172 (4) The designated bidder and its supervisory employees, while in
173 the employ of the designated bidder, have no adjudicated record of
174 substantial or repeated wilful noncompliance with any relevant federal
175 or state regulatory law including, but not limited to, laws concerning
176 labor relations, occupational safety and health, nondiscrimination and
177 affirmative action, environmental protection and conflicts of interest;

178 (5) The proposed privatization contract is otherwise in the public
179 interest;

180 (6) The projected cost savings of the proposed privatization contract
181 will exceed ten per cent of the cost of delivering the services with state
182 employees; and

183 (7) Each bid shall detail:

184 (A) The length of continuous employment of current employees of
185 the contractor by job classification, without personally identifying
186 employees by name. In addition, the contractor may submit
187 information detailing the relevant prior experience of current
188 employees within each job classification. If the positions identified by
189 the bidder are newly created positions, the bid shall identify the
190 minimum requirements for prospective applicants for each such
191 position.

192 (B) The annual rate of employee turnover.

193 (C) The number of hours of training planned for each employee in
194 areas directly related to the provision of services to state residents and
195 clients.

196 (D) Any legal complaints issued by an enforcement agency for
197 alleged violations of applicable federal, state or local rules, regulations
198 or laws, including laws governing employee safety and health, labor
199 relations and other employment requirements, and any citations, court
200 findings or administrative findings for violations of such federal, state
201 or local rules, regulations or laws. Such information shall specify the
202 date of the complaint, citation, court finding or administrative finding,
203 the enforcement agency, rule, law or regulation involved and any
204 additional information the contractor elects to submit.

205 (E) Any collective bargaining agreements or personnel policies
206 covering the employees that will provide services to the state.

207 (F) Any political contributions made by the bidder or any employee
208 who holds a management position with the bidding company, to any
209 elected officer of the state or member of the General Assembly during
210 the four years prior to the due date of the bid.

211 (b) A copy of the proposed privatization contract shall accompany
212 the certificate transmitted to the State Auditors.

213 Sec. 9. (NEW) (a) The State Auditors shall review the certificate and
214 proposed privatization contract and notify the agency of the State
215 Auditors' approval or objection not less than thirty days after receiving
216 the certification required by section 8 of this act. No agency shall
217 implement a privatization contract and no such contract shall be valid
218 if the State Auditors notify the agency of the State Auditors' objection.
219 Such objection shall be in writing and shall state specifically the
220 requirements under sections 2 to 4, inclusive, of this act that the agency
221 has failed to comply with, including any facts that the State Auditors
222 find incorrect, based on an independent review of all relevant facts.

223 (b) For the purpose of reviewing the agency's compliance and
224 certification pursuant to section 8 of this act, the State Auditor, or a
225 designee, may issue a summons to any person to appear and testify
226 under oath and to produce books, papers and other records relating to
227 such review. All provisions of the general statutes relative to
228 summonses in civil cases, including the manner of service, the scope
229 and relevance to such review and the compensation of witnesses who
230 are not state employees shall apply to such summonses.

231 (c) The objection of the State Auditors pursuant to subsection (a) of
232 this section shall be final and binding on the agency, unless the State
233 Auditors thereafter, in writing, withdraw the objection, stating the
234 specific reasons, based upon a revised certificate by the agency and the
235 Commissioner of Administrative Services.

236 Sec. 10. (NEW) (a) The Commissioner of Administrative Services
237 shall adopt regulations pursuant to chapter 54 of the general statutes
238 governing contracts between governmental units and social services
239 program providers that shall include, but not be limited to:

240 (1) A provision requiring that all transactions between said
241 providers and related parties shall be disclosed in writing in advance
242 to the Department of Administrative Services and to the agency
243 affected by the privatization contract, either of which may prohibit the
244 transaction by written notice to the provider;

245 (2) A provision requiring that any reductions by said providers in a
246 rate of reimbursement, or other payment method or total expenditure,
247 shall be applied, first against expenditures on managerial personnel,
248 including, but not limited to, management fees, salaries, benefits and
249 other compensation paid to managers and shall be applied in the last
250 instance against expenditures on direct service workers;

251 (3) A provision requiring that any contracts for funds expended by
252 the state, that does not require the state to be reimbursed or

253 compensated by the provider who amortizes the mortgages for the
254 ownership of property, whether owned directly or indirectly by said
255 provider, shall contain provisions for the recoupment of said
256 reimbursement or compensation by the state in the event said property
257 is sold and may, if necessary, allow for the execution of liens to ensure
258 such recoupment;

259 (4) A provision requiring a complete inventory of equipment
260 purchased by said providers on behalf of the state and the return of
261 such equipment to the proper governmental unit upon the completion
262 or termination of the contract;

263 (5) A provision requiring that the uniform financial report include a
264 subsidiary schedule for each component cost and a related party
265 disclosure statement from each officer, director and trustee of said
266 providers;

267 (6) Provisions prohibiting any subcontract or consultant contract for
268 services from a parent organization or parent agency at the national,
269 state or local level;

270 (7) A provision prohibiting the refusal to service any case or type of
271 case, or place any restrictions or limitation on services, the provisions
272 of which were mutually agreed upon in the conditions specified in the
273 contract, subsequent to the finalization of such contract either primary
274 or secondary; and

275 (8) A provision prohibiting the use of state funding for investment
276 counseling, fund-raising, management consultants and other services
277 that are not directly related to the servicing of clients, patients and
278 other persons served by the provider agency.

279 (b) If, after a hearing, the Department of Administrative Services
280 finds any violation of any regulations adopted pursuant to subsection
281 (a) of this section, the Department of Administrative Services may

282 order that the contract be terminated, or the Attorney General may
283 assess a civil penalty of not more than two thousand dollars or ten per
284 cent of the amount payable under the contract, whichever is greater,
285 that the agency shall withhold from payments otherwise due under
286 the contract. Notwithstanding any provision of the general statutes,
287 any provider aggrieved under this section may exercise any legal
288 remedy or cause of action available to such provider under the
289 provisions of the general statutes. If, after a hearing, the Commissioner
290 of Administrative Services determines that a provider has committed
291 any wilful violation of subsection (a) of this section, said commissioner
292 may disqualify the provider from bidding on further state contracts.

293 Sec. 11. (NEW) (a) Within five days after the State Auditors notify
294 an agency of the State Auditors' approval under section 9 of this act of
295 a proposed privatization contract between such agency and a
296 nongovernmental person or entity, that has a value of five million
297 dollars or more, the agency shall file such contract with the clerks of
298 the House of Representatives and the Senate.

299 (b) Within five days after the clerks receive such contract, the
300 speaker of the House of Representatives and the president pro tempore
301 of the Senate shall submit the contract to the joint standing committees
302 of the General Assembly having cognizance of matters relating to (1)
303 government administration, and (2) appropriations and the budgets of
304 state agencies.

305 (c) Within twenty-five days after the speaker of the House of
306 Representatives and the president pro tempore of the Senate receive
307 such contract, such committees shall hold a public hearing on the
308 contract and shall report their recommendations to the House of
309 Representatives and the Senate concerning the approval or rejection of
310 the contract.

311 (d) The General Assembly may approve the contract, in whole, by a
312 majority vote of each house or may reject the contract, in whole, by a

313 majority vote of either house. If rejected, the contract shall not be valid
314 and shall not be implemented. The contract shall be deemed rejected if
315 the General Assembly fails to vote to approve or reject the contract (1)
316 prior to the adjournment of the regular session of the General
317 Assembly during which the contract is filed, (2) prior to the
318 adjournment of the next regular session of the General Assembly
319 following the date on which the contract is filed if the General
320 Assembly is not in regular session on such date, or (3) prior to the
321 adjournment of a special session convened before the next regular
322 session of the General Assembly for the purpose of considering the
323 contract if the General Assembly is not in regular session on the date
324 on which the contract is filed. However, if the contract is filed less than
325 thirty days before the end of a regular session, the General Assembly
326 may vote to approve or reject the contract (A) within thirty days after
327 the first day of a special session convened before the next regular
328 session of the General Assembly for the purpose of considering the
329 contract, or (B) within thirty days after the first day of the next regular
330 session of the General Assembly.

331 Sec. 12. (NEW) State funds shall not be used to support or oppose
332 union activity by the employees of any contractor that executes a
333 privatization contract, including, but not limited to, preparation and
334 distribution of materials that advocate for or against unionization,
335 hiring or consulting legal counsel or other consultants to advise the
336 contractor how to assist, promote or deter union organizing or how to
337 impede a union that represents the contractor's employees from
338 fulfilling its representational responsibilities.

339 Sec. 13. (NEW) (a) No person shall retaliate or discriminate in any
340 manner against any public employee or any employee of a private
341 contractor because the employee, or any person acting on behalf of the
342 employee, acting in good faith (1) engaged in any disclosure of
343 information related to the services provided by the contractor pursuant
344 to a privatization contract, (2) advocated on behalf of service recipients

345 with respect to the care or services provided by the contractor, (3)
346 initiated, cooperated or otherwise participated in any investigation or
347 proceeding of any governmental entity related to the services provided
348 pursuant to a privatization contract.

349 (b) No person shall retaliate or discriminate in any manner against
350 any public employee or any employee of a private contractor because
351 the employee has attempted or has an intention to engage in an action
352 described in subsection (a) of this section.

353 (c) No person shall, by contract, policy or procedure, prohibit or
354 restrict any employee of a private contractor from engaging in any
355 action for which a protection against discrimination or retaliation is
356 provided under subsection (a) or (b) of this section.

357 (d) Nothing in subsection (a) or (b) of this section shall be construed
358 to protect disclosures that would otherwise violate federal or state law
359 or diminish or impair the rights of any person to the continued
360 protection of confidentiality of communications provided by state or
361 federal law.

362 (e) For purposes of this section, an employee is "acting in good faith"
363 if (1) the employee reasonably believes the information disclosed by
364 the employee is true, and (2) the information disclosed by the
365 employee (A) evidences a violation of any law, rule or regulation, or a
366 generally recognized professional or clinical standard, or (B) relates to
367 care, services or conditions that potentially endanger one or more
368 recipients of services or employees working pursuant to a
369 privatization contract.

370 (f) All privatization contracts shall include a contract provision
371 specifying that in order to determine compliance with the provisions
372 of this section as well as the privatization contract, the private
373 contractor shall be required to provide the state or its agents, except
374 where prohibited by federal or state laws, regulations or rules,

375 reasonable access, through representatives of the private contractor, to
376 facilities, records and employees that are used in conjunction with the
377 provision of services specified in the privatization contract.

Statement of Legislative Commissioners:

In subdivision (2) of section 1, the term "legal consulting" was changed to "legal services" for clarity; and in sections 2 and 3, the reference to employees was changed to "regular employees of the agency" for consistency throughout the bill.

<i>LAB</i>	<i>Joint Favorable Subst. C/R</i>	GAE
<i>GAE</i>	<i>Joint Favorable C/R</i>	APP
<i>APP</i>	<i>Joint Favorable Subst.-LCO</i>	

The following fiscal impact statement and bill analysis are prepared for the benefit of members of the General Assembly, solely for the purpose of information, summarization, and explanation, and do not represent the intent of the General Assembly or either House thereof for any purpose:

OFA Fiscal Note

State Impact: Significant Cost¹

Affected Agencies: Department of Administrative Services, State Auditors, Attorney General, Legislative Management, Various Criminal Justice Agencies

Municipal Impact: None

Explanation**State Impact:**

The bill results in significant cost to several state agencies. The future impact on the ability of the state to utilize contracted services and on the cost of contracted services is indeterminate.

The bill establishes procedures that executive branch agencies and officials must follow before making a contract with a private entity to provide public services valued at \$750,000 or more. There will be costs of compliance to an agency contracting services that cannot be determined at this time. To the extent that there are savings to be achieved from contracting out state services, there will be a delay and a potential decrease in the savings as a result of administrative processes established by the bill.

¹ OFA defines significant cost as exceeding \$100,000.

Any executive agency making such a contract must consult with the Department of Administrative Services (DAS). DAS would incur additional costs, that cannot be determined at this time, but that could be significant. State agencies would consult with DAS to prepare an outsourcing cost/benefit analysis for proposal. DAS must certify to the state Auditors that the prospective contractor meets certain specified requirements, including that the projected savings will exceed 10% of current costs. DAS would also be required to adopt regulations governing contracts between governmental agencies and social services program private providers.

Under the bill, the Auditors of Public Accounts is required to review the DAS certification and the proposed privatization contract and then has 30 days to approve or object to a contract. The bill permits the State Auditors to issue a summons to anyone to appear, testify, or produce records relating to their review. Depending on the number of contracts, the Auditors of Public Accounts may require an additional two positions (for combined Personal Services costs of \$130,000 and an additional \$51,000 for fringe benefits) and indeterminate Other Expenses funding for potential costs associated with the retention of outside professional services on an as-needed basis.

If provisions of this bill concerning privatization contracts are interpreted to apply to existing contracts greater than \$750,000 entered into by state agencies, a significant cost will be incurred by said agencies. This cost would be associated with performing cost benefit analyses, preparing comprehensive written estimates of the costs of state employees providing the same services, providing notice and assistance to each applicable collective bargaining unit when soliciting bids for a privatization contract, and enhanced administrative oversight of contracts. If, alternatively, this bill were interpreted to apply only to new contracts over \$750,000, the identified impact would be mitigated, but is still anticipated to be significant in magnitude.

An additional significant cost would be incurred in the course of reviewing and approving transactions between social services program providers and related parties. Should this heightened review of state contracting result in the identification of cost saving alternatives, indeterminate future year savings might ensue. The bill specifies that the Attorney General may bring a civil action to enforce the provisions relating to employees of the contractor. It is anticipated that this can be done within the existing resources of the Attorney General.

The bill also requires approval of the General Assembly for contracts valued at \$5 million or more. It is anticipated such action by the General Assembly would occur during a normally scheduled session day. To the extent that legislators are required to make additional trips to the Capitol as a result of a public hearing(s) a potential minimal cost may result due to mileage reimbursement (currently, 34½ cents per mile). However, considering that legislators make considerable trips to the Capitol during the session it is anticipated that any increased costs due to mileage reimbursement can be handled within the budgetary resources of Legislative Management.

The bill also contains provisions specifying that the public records that the contractor possess, modifies or creates are the property of the state, and that such records are still subject to the confidentiality provisions of the Freedom of Information Act. The Attorney General may bring action in the Superior Court if there are violations of such provisions, seeking damages, restitution and a civil penalty of up to \$50,000. Individuals are also allowed to bring such actions. In addition, criminal penalties are established for anyone who knowingly violates these provisions. For each violation, there can be a fine of up to \$5,000, imprisonment from 1 to 5 years, or both. This results in potential cost and revenue gain to the state that are not anticipated to be significant.

Finally, the bill prohibits the use of state funds to support or oppose union activity by employees of any contractor that executes a privatization contract. It prohibits retaliation or discrimination against public employees and employees of the contractor who (1) participate in an investigation related to services provided under the contract and (2) engage in union activities. These provisions have no fiscal impact.

OLR BILL ANALYSIS

sSB 1036

***AN ACT SETTING PROCEDURES, PERFORMANCE STANDARDS
AND WORKPLACE QUALITY STANDARDS FOR ANY
CONTRACTING OUT OF STATE PROGRAMS AND SERVICES.*****SUMMARY:**

This bill establishes procedures that executive branch agencies must follow before contracting with a private entity to provide public services valued at \$750,000 or more. It excludes contracts solely for legal or management consulting services.

Under the bill, an agency cannot contract to have a private person or entity provide services similar to and substituted for services provided by regular state employees unless the:

1. agency, in consultation with the Department of Administrative Services (DAS), compares the costs and benefits of privatizing services with not privatizing them and prepares a written public statement of current services specifying their quantity and quality standards;
2. agency prepares a written estimate of the most efficient costs of state employees providing the same quality services;
3. contract is no longer than five year;
4. agency solicits competitive bids and helps agency employees to submit one;
5. bids include wage rates that bidders will pay for each position, and the bidder offers available positions to qualified agency employees;
6. agency head and DAS commissioner certify specific compliance issues, including a statement that the projected savings exceed the

cost of state employees doing the job by 10%, to the state auditors and send them a copy of the contract; and

7. state auditors approve the contract, and for contracts valued at \$5 million or more, the legislature also approves.

The bill requires DAS to adopt regulations governing contracts between governmental units and social services program providers. A provider's violation of the regulations can result in termination of a contract, civil penalties, and disqualifications from bidding on future contracts.

The bill bars contractors from having any ownership or interest rights in "public records" related to the contract and makes such records public records for purposes of the Freedom of Information Act. It also establishes penalties for public record violations.

The bill prohibits contractors from using state funds to support or oppose union activity by its employees, including hiring lawyers and consultants.

Finally, it prohibits people from retaliating or discriminating against employees who make good faith disclosures concerning the contracts.

EFFECTIVE DATE: October 1, 2001

COST- BENEFIT ANALYSES

An agency must prepare cost-benefit analyses comparing the cost and quality of privatizing services and continuing to provide them with state employees. It cannot execute a valid privatization contract unless it does so. The agency must consult with the DAS commissioner and send the analyses to the state auditors.

PRE-BID PROCEDURES

If an agency determines that it is cost-effective to privatize certain services, it must prepare a written statement of them, including the amount needed and the required quality standards. The written statement is a public record and must be filed in the agency and with

DAS and sent to the comptroller.

The agency must also prepare a written estimate of the cost of having its regular employees perform such services in the most cost-efficient way and the quality of services its employees would provide. The estimate must include all direct costs, including employee benefits. Unemployment compensation and retirement benefits must be reported separately. The value of state-owned property or assets must also be reported separately.

The bill invalidates any contract an agency amends for the purpose of avoiding these requirements.

At least 60 days before soliciting bids, the agency must notify all unions representing its employees of its plans. It must provide "adequate resources" to encourage and assist agency employees to organize and submit a bid. "Adequate resources" are those provided in existing collective bargaining agreements with its employees or similar ones in other agencies. The bill permits employees to bid with another person in a joint venture.

BIDS AND CONTRACTS

All bids solicited by the agency must be sealed, due on the same day, and considered equally. All bids and contracts must include the wage rate the bidder will use for employees working under the contract and provisions requiring the contractor to offer available positions to agency employees who lose their jobs because of the contract award and who meet the contractor's qualifications.

After the contract begins, the contractor must submit quarterly payroll records to the agency showing the hours worked and hourly wage paid to each employee identified by name, address, and Social Security number. Contractors must agree to comply with state nondiscrimination policies and take affirmative steps to provide equal employment opportunities. The bill authorizes the attorney general to sue to enforce the offering available positions to state employees, reporting, and nondiscrimination requirements and to prevent any disciplinary action taken against an employee as a result of a violation of these provisions.

Contractors must also agree to allow the state reasonable access, except where prohibited by state or federal law, to facilities, records, and employees to ensure compliance with the bill.

CERTIFICATION

The head of any agency soliciting bids and the DAS commissioner must certify in writing to the state auditors that:

1. they complied with the bill's bidding and contract requirements;
2. they conducted a cost-benefit analysis and determined it would be cost-effective to privatize the services;
3. the quality of the services that the designated bidder will provide is likely to meet the standards specified in the bid and equals or exceeds the quality of services that agency employees could provide;
4. the designated bidder and its supervisory employees, while working for the bidder, have no adjudicated record of substantial or repeated willful noncompliance with any relevant federal or state regulatory law;
5. the contract is in the public interest;
6. projected savings will exceed 10% of the cost to the state for the services using state employees; and
7. each bid contains specific information about (a) how long current employees have worked for the bidder by job classification (information about employees relevant experience may also be included) and, if positions are new, the minimum requirements for prospective applicants; (b) the annual rate of employee turnover; (c) the number of training hours planned for each employee in areas involving direct services under the contract; (d) detailed information on any legal complaints an enforcement agency issued for alleged violations of applicable federal, state, or local laws or regulations, or any citations, court, or administrative findings

concerning such violations; (e) the bidder's collective bargaining agreements or personnel policies; and (f) any political contributions made by the bidder or a management employee to any state elected official or representative during the four years prior to the bid.

A copy of the proposed contract must be filed with the certificate sent to the state auditors.

REVIEW BY STATE AUDITORS

The auditors must review certificates and proposed contracts and notify agencies of their approval or objection within 30 days. Objections must be in writing and state the specific requirements that the agency failed to meet or factual errors in its submission. The auditors may order people to appear, testify, or produce records relating to their review.

No contract can be implemented or considered valid if the auditors notify the agency that they object. The objection is final and binding unless and until they withdraw it based on revised certifications from the agency and DAS.

LEGISLATIVE APPROVAL

Within five days after the auditors notify an agency they have approved a contract worth \$5 million or more, the agency must file the contract with the clerks of both houses. The House speaker and the Senate president pro tempore then have five days to submit the contract to the Appropriations and Government Administration and Elections committees. The committees must hold a public hearing and report their recommendations to both houses within 25 days after the leaders receive the contract.

The legislature may approve the contract by a majority vote of each house or reject it by a majority vote of either house. They must approve or reject the whole contract. The contract is deemed rejected if the legislature fails to vote (1) prior to the adjournment of the regular session during which the contract is filed, or (2) if, the contract is filed when the legislature is not in session, before the adjournment of the next regular session or of a special session convened to consider the

contract. But, if the agency files the contract less than 30 days before the end of a regular session, the legislature may either convene a special session and vote within 30 days or vote on it within the first 30 days of its next regular session.

CONTRACTS WITH SOCIAL SERVICES PROGRAM PROVIDERS

The bill requires the DAS commissioner to adopt regulations governing contracts between “governmental units” (presumably state executive agencies) and social services program providers. The regulations must include at least the following:

1. a provision authorizing the affected agency and DAS to bar transactions between a provider and related parties after receiving advance written notice of the transaction and sending a written notice to the provider;
2. a requirement that a provider must apply any reduction in a reimbursement rate, payment, or expenditure first to reduce the payment for managerial personnel and lastly against spending for direct service workers;
3. a requirement that, in certain circumstances, gives the state the right to recoup its payments to a provider or execute a lien on its property when the provider amortizes a mortgage then sells it;
4. a requirement that the provider make a complete inventory of all equipment purchased on behalf of the state and return the equipment to the state when the contract is completed or terminated;
5. a requirement that the uniform financial report (not defined by the bill) include a subsidiary schedule for each component cost and a related party disclosure statement from each of the provider’s officers, directors, and trustees;
6. a ban on subcontracts or consultant contracts for services with the provider’s parent organization or parent agency;
7. a prohibition against the provider’s limiting or refusing to provide

services to an individual case or type of case as agreed to in the contract; and

8. a prohibition on the use of state funds for investment counseling, fund-raising, management consultants, and other services not directly related to services for clients or patients.

If, after a hearing, DAS finds that a provider is violating its regulations, it may order the contract terminated, or the attorney general may assess a civil penalty of up to \$2,000 or 10% of the amount payable under the contract, whichever is greater. The agency must withhold the penalty from any payments it still owes under the contract.

After holding a hearing, the DAS commissioner can also disqualify any provider who willfully violates the regulations from bidding on future state contracts.

The bill gives any aggrieved provider the right to exercise any legal remedy or cause of action available under the law.

PUBLIC RECORD

The bill bars contractors, subcontractors, and their employees or agents from having any ownership rights or interests in any public records they possess, modify, or create under the contracts. All such records are state property. Contractors, subcontractors, and their employees or agents are prohibited from impairing the integrity of these records.

FREEDOM OF INFORMATION ACT REQUIREMENTS

The bill states that any public records provided to or created by a contractor or subcontractor pursuant to a contract are public records for purposes of the Freedom of Information Act (FOIA). But, public records are already subject to FOIA. The enforcement provisions of FOIA apply to any improper failure to disclose such records.

The agency, contractor, and subcontractor are joint and severally liable for any of the agency's FOIA obligations concerning public records related to the privatization contract. The final determination about whether or not to disclose a record must be made solely by the agency.

Contractors, subcontractors, or their employees or agents are prohibited from disclosing to the public any public record that they possess, modify, or create that the agency (1) is prohibited from disclosing pursuant to state or federal law, (2) may only disclose to certain individuals or under certain circumstances under state or federal law, or (3) may withhold from disclosure pursuant to state or federal law. Contractors may disclose such records to their subcontractors in order to carry out the contract.

Contractors, subcontractors, and their employees or agents are prohibited from selling, marketing, or otherwise profiting from the disclosure or use of any public records unless authorized by the contract.

Contractors, subcontractors, or their employees that learn about public record violations must notify the agency head and attorney general of the violation within seven days of their discovery.

PENALTIES

In addition to the FOIA remedies, if any person violates any of the bill's requirements concerning public records, the attorney general may sue the person for damages to the state, restitution for any person damaged, and a civil penalty up to \$50,000. In addition, any person aggrieved by a violation of the public record requirements may sue for damages. These actions must be brought within three years of the violation. The court, in such cases, may (1) order the party to give up any profits or benefits made from the violation; (2) award punitive damages, costs, or reasonable attorney's fees; or (3) order injunctive or other equitable relief. Proof of public interest or public injury is not needed.

Any person who knowingly and willfully violates the public record requirements is subject to a fine of up to \$5,000, one to five years in prison, or both for each violation.

GOOD FAITH DISCLOSURES

The bill prohibits people from discriminating or retaliating against any

public or contractor employee who, acting in good faith (1) discloses information related to the contractor's services, (2) advocates on behalf of service recipients about services, or (3) is involved in a government investigation or proceeding related to the services. It also prohibits anyone from restricting any such activities. These protections do not apply if the disclosures violate state or federal law.

"Acting in good faith" means the employee reasonably believes the information is true and the information disclosed (1) reveals a violation of law, rule, regulation, or recognized professional or clinical standards or (2) relates to conditions that could endanger provider employees or recipients.

COMMITTEE ACTION

Labor and Public Employees Committee

Joint Favorable Substitute Change of Reference

Yea 9 Nay 4

Government Administration and Elections Committee

Joint Favorable Change of Reference

Yea 15 Nay 5

Appropriations Committee

Joint Favorable Report

Yea 31 Nay 20